Nevertheless, Time Warner recognizes that reasonable Commission regulations designed to promote sharing of excess capacity in hallway molding or internal conduit would facilitate multiwire competition, which should be the Commission's overarching goal in this proceeding.[93] Thus, Time Warner offers the following proposal. Whenever there is agreement among all affected MVPDs and the MDU owner that hallway moldings or internal conduit can safely accommodate additional home run cables, the parties shall be required to negotiate in good faith regarding reasonable compensation for occupancy of such moldings or conduit. Where such compensation cannot be agreed upon, the Commission might, upon submission of an appropriate petition, determine the rate in accordance with the principles applicable to cable television occupancy of utility conduits, or the arbitration procedures outlined in Section III.B.1. of these Comments might apply. Where it cannot be agreed that existing moldings or conduit can safely accommodate additional wires, and the MDU owner is willing to allow installation of larger moldings or conduit, the party owning the molding or conduit shall install larger molding or conduit at the expense of the party seeking occupancy. This is the same procedure that applies when an existing utility pole is inadequate to accommodate additional attachments requested by a cable operator. Any party who attempts to occupy moldings or conduit without following these procedures would be subject to the immediate removal of such facilities. If the Commission adopts these procedures, Time Warner would be willing to waive the provisions of any exclusive molding rights it has by contract or by law as a gesture of good faith, and to assist the Commission in the promotion of facilities-based competition.

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[93]See Further Notice at ¶ 62.

IV. The Commission Lacks Jurisdiction To Adopt ICTA's Proposals For The Disposition Of Home Run And Cable Home Wiring.

A. The ICTA Proposal Is Beyond The Statutory Authority Conferred By Congress On The Commission With Regard To The Disposition Of Home Run Wiring.

The Commission has tentatively concluded that it has authority under Sections 4(i) and 303(r) of the Communications Act[94] to establish procedures for the disposition of MDU home run wiring upon termination of service.[95] The Commission's tentative conclusion that it has such authority is contrary to both the plain language of the home wiring provision, 47 U.S.C. § 544(i), and the legislative history of that provision. Moreover, the cases cited by the Commission permitting broad grants of authority under Section 4(i) are distinguishable from the present situation, and therefore, do not support a similar outcome with regard to the cable home wiring rules. In this case, the Commission simply cannot exceed the specific scope of authority granted to it in the home wiring statute.

The Further Notice proposes schemes for the disposition of two segments of cable wiring: "(1) the home run wiring from the point where the wiring becomes devoted to an individual unit to the cable demarcation point; and (2) the cable home wiring from the demarcation point to the subscriber's television set or other customer premises equipment."[96] However, under the home wiring provision, the Commission only has authority to enact regulations pertaining to the "cable home wiring" and not to the "home run wiring."

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[94]47 U.S.C. § 154(i) and 47 U.S.C. § 303(r), respectively.

[95]Further Notice at ¶ 54.

[96]Id. at ¶ 73.

The plain language of the statute conferring authority on the Commission to regulate the disposition of cable home wiring specifically states that regulations enacted pursuant thereto shall apply to "cable installed by the cable operator within the premises of [the] subscriber."[97] Home run wiring is not "within the premises" of the subscriber's dwelling unit in an MDU. Rather, home run wiring can run through the hallways and stairwells, on the rooftop, in the basement, and between the floors of an MDU building. Home run wiring can include hundreds of feet of cable wiring located outside a subscriber's dwelling unit. Application of the Commission's home wiring rules to wiring that is merely inside an MDU building, but definitely not within a subscriber's dwelling unit, is contrary to the plain language of the statute, and cannot be justified by reliance on an expansive reading of the authority given the Commission under Section 4(i) or 303(r) of the Communications Act.

If there exists any doubt regarding Congress' intent, as stated in the plain language of the home wiring provision, that doubt is completely resolved by the legislative history pertaining to Section 624(i), wherein Congress elaborated on the meaning of the home wiring provision by explicitly stating that such provision "limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit,"[98] and that it is "not intended to cover common wiring within the [MDU] building, but only the wiring

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[97]47 U.S.C. § 544(i) (emphasis added).

[98]H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992) ("House Report") (emphasis added). The conference agreement recommending passage of the 1992 Cable Act specifically adopted the House provisions pertaining to cable home wiring. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 86 (1992).

within the dwelling unit of individual subscribers."[99] Thus, the legislative history reinforces the fact that the home wiring provision is not to be expanded to cover wiring outside the subscriber's premises, even under the guise of authority conferred by Section 4(i) or 303(r).

Section 4(i) provides that

> [t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter [47 U.S.C. §§ 151-613], as may be necessary in the execution of its functions.[100]

Similarly, Section 303(r) provides in part that, "as public convenience, interest, or necessity requires," the Commission shall

> [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter [47 U.S.C. §§ 151-613].[101]

These non-substantive grants of very general Commission authority are inconsistent with, and therefore, do not override the more recent, more specific, and more limited authority bestowed on the Commission in the 1992 Cable Act's home wiring provision. In short, Sections 4(i) and 303(r) are purely procedural, and are designed to afford administrative flexibility for the Commission to implement express Congressional directives. Sections 4(i) and 303(r) cannot be read as an independent grant of jurisdiction over an area where Congress has intentionally withheld such authority.

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[99]House Report at 119 (emphasis added); see also S. Rep. No. 92, 102d Cong., 1st Sess. 23 (1991) ("Senate Report").

[100]47 U.S.C. § 154(i).

[101]47 U.S.C. § 303(r).

The Commission's denouncement of the canon of statutory construction whereby the "specific governs the general"[102] overlooks several important facts in this case that Time Warner believes warrant further consideration before the Commission erroneously discards an entire canon of statutory construction, and enacts rules beyond the scope of its statutory authority. First, the well-established canons of statutory construction allow a more specific provision to govern over a broad, general provision,[103] and a more recent, more specific provision to govern over an older statute that does not specifically address the issue.[104] In the present case, this means that the specific home wiring provision of the 1992 Cable Act governs over the older, more general provisions, Sections 4(i) and 303(r), of the Act.[105]

The Commission correctly notes that the "specific governs over the general" canon applies only where there "is an 'inescapable conflict' between the specific provision and the general provision."[106] However, the Commission tentatively concludes that the home

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[102]See Further Notice at ¶ 63.

[103]See Eskridge and Frickey, Cases and Materials on Legislation -- Statutes and the Creation of Public Policy at 616-17 (1988) ("Eskridge and Frickey") (discussion of dynamic theory of statutory interpretation); see also Sunstein, C., "Interpreting Statutes in the Regulatory State," 103 Harv. L. Rev. 405, 452-53 (1989) ("Sunstein") (canons of construction continue to be a prominent feature in the federal and state courts, and the use of the principles contained therein can be found in all areas of modern law).

[104]See Eskridge and Frickey at 616-17; Sunstein, 103 Harv. L. Rev. at 412 (statutory meaning does not remain constant over time).

[105]Section 4(i) has never been revised since its enactment as part of the Communications Act of 1934; Section 303(r) was added to the Communications Act in 1937, and has not been amended in the 60 years since its passage.

[106]Further Notice at ¶ 63 (quoting Aeron Marine Shipping Co. v. United States, 695 F.2d 567, 576 (D.C. Cir. 1982)).

wiring provision, 47 U.S.C. § 544(i), does not expressly prohibit the Commission from adopting rules affecting home run wiring when, in fact, it does.

In determining whether the home wiring provision expressly prohibits the Commission from enacting regulations pertaining to home run wiring, the Commission must look not only at the plain language of the provision, but at the legislative history as well.[107] The plain language of the home wiring statute states that the home wiring rules shall pertain to "cable installed by the cable operator within the premises of [the] subscriber."[108] This limitation on the wiring that is to be covered by the Commission's home wiring rules is reiterated in the legislative history, which states, in no uncertain terms that, in MDUs, the home wiring rules are intended to cover "only the wiring within the dwelling unit of individual subscribers."[109] According to the Commission's description of home run wiring, such wiring runs "from the point where the wiring becomes devoted to an individual unit to the cable demarcation point,"[110] which is located "at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit."[111] Home run wiring is, therefore,

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[107]See Aeron Marine Shipping, 695 F.2d at 576 & n.26 (court considered legislative history of provision in question when determining whether specific provision and general provision were in conflict); see also Mobile Communications Corp. of Amer. v. FCC, 77 F.3d 1399, 1406 (D.C. Cir. 1996) ("Mtel") (in discussing court's decision in Railway Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 664-71 (D.C. Cir. 1994) (*en banc*), court explained that the conclusion in that case that the agency lacked authority for its action "followed a careful exegesis of the entire statutory context, the statute's legislative history, and the agency's unvarying practice over a 60-year history").

[108]47 U.S.C. § 544(i) (emphasis added).

[109]House Report at 119 (emphasis added).

[110]Further Notice at ¶ 73.

[111]47 C.F.R. § 76.5(mm).

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[108]47 U.S.C. § 544(i) (emphasis added).

[109]House Report at 119 (emphasis added).

[110]Further Notice at ¶ 73.

[111]47 C.F.R. § 76.5(mm).

entirely outside the subscriber's individual dwelling unit. Thus, any regulations that purport to apply to home run wiring are in direct contravention with Congress' intent, as expressed in the plain language of the home wiring provision and in its legislative history.

While the Commission notes that courts will defer to an agency's interpretation of a statute unless Congress has specifically addressed the precise question at issue,[112] the Commission fails to recognize that, in this case, Congress has specifically addressed the question of whether the Commission is empowered to affect the disposition of cable wiring that is located outside the subscriber's dwelling unit. Such wiring is not to be covered by the home wiring rules.[113] Thus, under the general provisions of the Communications Act, Sections 4(i) and 303(r), the Commission claims to have authority that Congress specifically did not intend the Commission to have when it enacted the 1992 Cable Act. Such a result must not be permitted.

The D.C. Circuit has also explicitly stated that "statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[114] The Commission's proposed construction of the home wiring provision is not only far beyond the scope of its statutory authority, but raises substantial Fifth Amendment taking concerns as well.[115] The home wiring provision simply does not need to be implemented such that it results in the unconstitutional taking of a cable operator's property. In fact, Time Warner's proposed

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[112]Further Notice at ¶ 63 & n.151.

[113]See House Report at 118-19; see also Senate Report at 23.

[114]Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

[115]See Section IV.C., *infra*.

clarifications and refinements to ICTA's proposal demonstrate that the home wiring provision can, and must, be implemented in a way that does not raise substantial constitutional questions.[116]

When Congress drafted the home wiring provision and the legislative history pertaining thereto, it must have realized that the inclusion of any wiring other than that installed within a subscriber's premises in the home wiring rules would amount to the expropriation of possibly hundreds feet of wiring that the cable operator paid for and installed, with the expectation that it would be providing cable service over that wiring. To force cable operators to cede control over such large amounts of cable wiring would create an uneven competitive playing field, as well as raise Fifth Amendment taking concerns.[117] In light of Congress' express intent with regard to the exclusion of home run wiring, or any other portion of the broadband distribution facility that is outside the subscriber's dwelling unit, from the Commission's home wiring rules, the Commission cannot invoke its general authority to contradict Congress.

Second, the cases the Commission relies on in support of its authority to regulate home run wiring under Section 4(i) of the Communications Act are distinguishable from the present case.[118] Specifically, the Commission string cites four cases,[119] characterizing them as cases where the court

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[116]See Section II., *supra*.

[117]The taking issue is addressed fully in Section IV.C., *infra*.

[118]See Further Notice at ¶ 55 & n.125 (discussing cases where Section 4(i) has been held to justify various Commission regulations that were not within explicit grants of authority).

[119]Id. at n.125.

> found that the Commission's regulations were not inconsistent with the Communications Act because they did not contravene an express prohibition or requirement of the Act, and were reasonably 'necessary and proper' for the execution of the agency's enumerated powers.[120]

As discussed above, the present case is different because the proposed regulations that would apply to home run wiring do contravene an express prohibition of the 1992 Cable Act. Moreover, rules pertaining to the disposition of home run wiring are not "necessary and proper" for the execution of the Commission's powers. Time Warner has repeatedly explained that the Commission can achieve its goal of promoting competition in the MVPD marketplace by encouraging competing MVPDs to install their own wiring in MDUs, rather than permitting competing MVPDs to usurp huge portions of the wiring already installed by the cable operator.[121] The Commission recognizes this as well.[122] Thus, the promulgation of rules that effectively force cable operators to cede control over home run wiring are not "necessary" in order for the Commission to achieve the goals set forth by Congress.[123] In fact, if a cable operator is forced to cede control over home run wiring,

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[120]Id. at ¶ 55.

[121]See, e.g., Time Warner *Ex Parte* Notice in MM Docket 92-260, at 4-5 (dated January 27, 1995); Time Warner *Ex Parte* Notice in MM Docket 92-260 and RM-8380, at 3-5 (dated December 5, 1994); Time Warner Reply Comments in RM-8380, at 14-18 (dated January 19, 1994); Time Warner Comments in RM-8380, at 15-17 (filed December 21, 1993).

[122]See Further Notice at ¶ 62 ("we recognize that subscriber choice would be enhanced by the use of multiple wires").

[123]The Commission has acknowledged that a problem in promoting consumer choice and competition by alternative MVPDs in MDUs lies with the MDU owners, rather than with the cable operators. Further Notice at ¶ 56 ("MDU owners often will not permit multiple home run wires to be installed in their buildings"). The fact that the MDU owners are a bottleneck to promoting competition is but one illustration showing that it is not "necessary" for the

(continued...)

that cable operator will be foreclosed from continuing to offer video, data or voice services to the residents of the units that no longer have wiring controlled by the cable operator. Such a result is contrary to Congress' goal of fostering competition, as set forth in the 1992 Cable Act.[124]

The Commission's string cite of cases finding that the Commission had authority under Section 4(i) to enact various regulations fails to mention the most recent case dealing with an assertion of jurisdiction under Section 4(i).[125] In Iowa Utilities, the court stated that Sections 4(i) and 303(r)

> merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC.[126]

The court ultimately concluded that none of the statutory provisions relied on by the Commission, including Sections 4(i) and 303(r), supplied it with jurisdiction over the pricing of local telephone service.[127]

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[123](...continued)
Commission to exceed its statutory authority by imposing regulations on the cable operator's home run wiring. Such regulations do not even attempt to remedy the bottleneck problem caused by MDU owners. The Commission simply cannot rely on Sections 4(i) and 303(r) for authority to enact regulations that are not only contrary to the home wiring provision, but are also not necessary to carry out the functions of the Commission.

[124]1992 Cable Act, at § 2(b).

[125]See Iowa Utilities Bd. v. FCC, No. 96-3321, slip op. (8th Cir. July 18, 1997).

[126]Id. at 103; see also California v. FCC, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990) (explaining that Title I of the Communications Act of 1934, which contains Section 154(i), confers only ancillary authority to the FCC).

[127]Iowa Utilities, No. 96-3321, slip op. at 104.

Rather than discussing the outcome of the Iowa Utilities case, the Commission relies heavily on the D.C. Circuit's 1996 Mtel decision.[128] The Mtel court held that the Commission had authority to regulate under Section 4(i) even where the Communications Act does not explicitly authorize such action. In that case, Mtel received a "pioneer's preference" in 1993, which would have resulted in Mtel receiving a PCS license without having to face competing applications, and without having to pay for such license.[129] However, before Mtel actually received its license, Congress changed the licensing scheme for PCS by amending the Communications Act to allow the Commission to use auctions for allocating PCS licenses when "mutually exclusive applications are accepted for filing."[130]

Under the prior licensing scheme, the filing of a mutually exclusive application would have triggered a comparative hearing, but the holder of a pioneer's preference would be able to pass on any such competition.[131] The Commission was faced with the question of how to treat Mtel -- should Mtel be permitted to escape not only competition with other applicants for a PCS license, but also the payment requirement? The Commission originally ruled that Mtel would not be required to pay, but then it reversed itself.[132] Mtel objected that the Commission lacked statutory authority to impose a license payment requirement on a pioneer's preference holder, and the D.C. Circuit held that the Commission had such

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[128]Mtel, 77 F.3d 1399; see Further Notice at ¶ 55.

[129]Mtel, 77 F.3d at 1402.

[130]Id. (citing Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002 (codified at 47 U.S.c. § 309(j)).

[131]Id. at 1403.

[132]Id.

statutory authority pursuant to Section 4(i). Congress granted the Commission authority to collect fees and conduct auctions for certain types of licenses, and Mtel argued that such specification meant that the Commission did not have authority to impose any other fees. The court rejected Mtel's reliance on the *expressio unius* maxim (that the expression of one thing is the exclusion of others), stating that the "maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue.'"[133]

In the present situation involving the proposed regulation of home run wiring, Congress has "directly spoken to the precise question at issue." Congress has stated that it did not intend for its home wiring rules to apply to any wiring outside the subscriber's individual dwelling unit.[134] In such a situation, deference is not due to the Commission's interpretation when that interpretation is contrary to Congress' stated intent. Indeed, an ultimate conclusion to include home run wiring in the home wiring rules would be arbitrary, capricious, and contrary to law, and should not be implemented.

Third, the Commission's belief that regulation of home run wiring will "assist the Commission in discharging its statutory obligations under Section 623(b) and its overall responsibility to pursue Congress' preference for competition stated in the 1992 Cable Act"[135] is unsupported. Section 623(b), which mandates the regulation of basic service tier rates, does not provide any jurisdiction over the regulation of home run wiring. In fact, the

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[133]Id. at 1404-05 (quoting Texas Rural Legal Aid, Inc. v. Legal Serv. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991) and Chevron U.S.A. v. NRDC, 467 U.S. 837, 842 (1984)).

[134]House Report at 118-19; see also Senate Report at 23.

[135]Further Notice at ¶ 58.

Commission has already enacted rate regulations that are properly limited to "cable home wiring,"[136] which the Commission has defined as wiring located on the subscriber's side of the point of demarcation.[137] Home run wiring is not on the subscriber's side of the point of demarcation, and is therefore, not within the scope of cable wiring regulated under Section 623(b).

B. The ICTA Proposal Is Also Beyond The Statutory Authority Conferred By Congress On The Commission With Regard To The Disposition Of Cable Home Wiring.

The Commission believes that "fostering competitive choice in MDUs requires the coordinated disposition of two segments of cable wiring: (1) the home run wiring . . . and (2) the cable home wiring from the demarcation point to the subscriber's television set or other customer premises equipment."[138] While the disposition of "cable home wiring" is within the statutory authority of the Commission under the home wiring provision, the Commission's proposal exceeds its statutory authority by creating its own definition of "subscriber" such that an MDU owner can be a subscriber, or an agent of the subscriber.[139] The Commission then tentatively concludes that the home wiring rules "would be triggered when an MDU owner terminates service for the entire building."[140]

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[136]See 47 C.F.R. § 76.923(a)(4).

[137]47 C.F.R. § 76.5(ll).

[138]Further Notice at ¶ 73.

[139]Id. at ¶¶ 75-76.

[140]Id. at ¶ 76.

The problem with the Commission's expansion of the term "subscriber" is that Congress meant "subscriber" to apply to the inhabitant(s) of a particular dwelling unit, and not to the owner of a building comprised of many dwelling units.[141] The legislative history is rife with statements supporting the proposition that a "subscriber" is the resident of an individual dwelling unit, and not the MDU owner:

(1) "[S]ubscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit."[142]

(2) "[T]his section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit."[143]

(3) "This section deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers."[144]

Moreover, the Commission has specifically defined "subscriber" in its own regulations as "a member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it."[145] An MDU owner does not fall within this definition because he further distributes cable programming to

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[141]See House Report at 118-19.

[142]Id. at 118 (emphasis added).

[143]Id. (emphasis added).

[144]Id. at 119 (emphasis added).

[145]47 C.F.R. § 76.5(ee) (emphasis added).

the residents of the MDU.[146] If the MDU owner were the "subscriber," under the Commission's rules, he could not distribute the cable programming service he received to his tenants.

Given Congress' repeated explanation that a subscriber is one who lives within the individual dwelling unit of an MDU, and the Commission's own definition of a subscriber, the Commission would be exceeding its statutory authority and contradicting its own rules by expanding the term "subscriber" to include the owner of an MDU.

C. Sections 4(i) And 303(r) Do Not Give The Commission Any Authority To Repeal The Takings Clause Of The Fifth Amendment.

While it appears that the Commission has tried to be careful in crafting its proposed regulations so as to mask any takings concerns,[147] these regulations nevertheless raise takings problems, because they create a presumption of abandonment of home run wiring if the cable operator does not remove or sell such wiring within a specified time period.[148] Any regulation that creates a presumption of abandonment of personal property constitutes a taking, for which there must be an opportunity for an adjudication of fair compensation in accordance with the Fifth Amendment and the due process clause.

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[146]See Petition of Walt Disney Co. for Waiver of Program Access Rules, Memorandum Opinion and Order, 9 FCC Rcd 4007, n.18 (1994) (hotels that receive cable programming and further distribute it to the guestrooms therein are not "subscribers," as that term is defined in 47 C.F.R. § 76.5(ee)).

[147]See, e.g., Further Notice at ¶ 34 (limiting its procedures to situations where the incumbent provider has no contractual, statutory, or common law right to maintain its home run wiring on the MDU property).

[148]Id. at ¶¶ 35, 39.

A regulation that creates a presumption of abandonment of the cable operator's inside cable wiring takes valuable property rights away from the cable operator. For example, the cable operator would no longer have the right to exclude others from using that part of the wiring that has been deemed abandoned,[149] nor would the cable operator be able to access its own wiring. A regulation that denies cable operators the right to exclude others from access to their wiring, and also denies them their right to access the wiring constitutes a taking of property without just compensation.[150]

Moreover, the broad, general authority granted to the Commission by Sections 4(i) and 303(r) does not reach so far as to grant the Commission authority to effect a taking of the cable operator's personal property. The D.C. Circuit has held that the Commission must have express statutory authority to effect a taking of personal property.[151] No such authority exists in the Communications Act as it relates to cable inside wiring. The Commission's attempt to expand its authority over the disposition of cable home wiring under Section 4(i) or 303(r) also short circuits whatever law the states have adopted in this area. Thus, the Commission's proposed regulations also unconstitutionally preempt existing state law, because they take away rights that are presently held under state law.

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[149]The right to exclude others from using a cable operator's inside wiring is a paramount property right, that if taken away by government action, constitutes a *per se* taking of property. See, e.g., Nixon v. United States, 978 F.2d 1269, 1285-86 (D.C. Cir. 1992); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Hodel v. Irving, 481 U.S. 704, 716 (1987).

[150]See Nixon, 978 F.2d at 1285-86 ("The test [for a taking] must be whether the access rights preserve for the former owner the essential economic use of the surrendered property. That is, has the former owner been deprived of a definable unit of economic interests? If so, then it is no answer that he may still stand in some relation to the property.").

[151]See Bell Atlantic, 24 F.3d at 1446-47.

The Commission has proffered that, under its proposal, if the incumbent service provider elects to abandon its wiring, ownership of the wiring will be determined as a matter of state law.[152] However, use of the term "abandon" carries with it the legal conclusion that the incumbent has relinquished any claim of ownership. If the Commission truly does not intend to illegally create or destroy property rights, and intends to allow ownership of inside cable wiring to be determined under state law, the second option of the Commission's proposal should not be to "abandon and not disable the wiring,"[153] but rather, should be to "leave the home run wiring in place without disabling such wiring." Thereafter, ownership rights could appropriately be determined in accordance with state law.

The Commission's proposed regulations do not remedy their own takings problem simply because the cable operator "has a reasonable opportunity to remove, abandon, or sell the wiring."[154] An "opportunity to remove" wiring is really not an "opportunity" when the alternatives -- forced abandonment or sale of the cable operator's wiring -- both result in the cable operator no longer having any relationship to its property. The cases cited by the Commission in support of the assertion that there is no Fifth Amendment taking when it is the cable operator's failure to act, rather than the Commission's rule, that would extinguish the cable operator's rights to his property are inapposite in the present case.[155]

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[152]Further Notice at n.98.

[153]Id. at ¶ 35.

[154]Id. at ¶ 72.

[155]See id. at n.170.

In Texaco v. Short,[156] the state of Indiana created property interests in minerals that, if not used for a period of 20 years, automatically lapsed and reverted to the current surface owner of the property.[157] In other words, the right to the minerals was conditioned on an indication of a present intent on the part of the owner of the mineral interest to retain such interest.[158] The Court held that the Act creating this scheme did not result in an unconstitutional taking of property without just compensation, because the Act did not cause the lapse of the property right; rather the property owner's own failure to make any use of the property was what caused the property right to lapse.[159]

In the present case, the cable operator is not being offered any opportunity to make use of his cable wiring once the subscriber has terminated cable television service. Even the option of removing the wiring does not allow the cable operator to use that wiring to offer cable or some other service to residents of the MDU. Furthermore, there is no provision in the Commission's proposed regulations whereby the cable operator can indicate his intent to continue using his cable wiring for the provision of service and thereby preserve his property rights.

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[156]Texaco, Inc. v. Short, 454 U.S. 516 (1982).

[157]Id. at 518.

[158]Id.

[159]Id. at 530; see also United States v. Locke, 471 U.S. 84 (1985) (involving a recording system designed to rid federal lands of stale mining claims; the Court held that there was no unconstitutional taking of property because property loss could be avoided by filing a notice of intention to hold a claim).

Once a regulation effects a taking of property, the just compensation clause of the Fifth Amendment is triggered.[160] To satisfy the just compensation clause, the Commission cannot simply prescribe some manner of "just compensation" for the forced abandonment of the cable operator's internal wiring;[161] rather compensation can only be determined in an adjudicatory proceeding.[162] Under Florida Power, the court held that the legislature could not prescribe a

> 'binding rule' in regard to the ascertainment of just compensation, [because] Congress has usurped what has long been held an exclusive judicial function. . . . As the Supreme Court held in Monongahela [Navigation Co. v. United States, 148 U.S. 312, 327-28 (1893)], such interference 'with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution.'[163]

Because the legislative act in question in Florida Power did not allow for an adjudication of what constitutes just compensation, the court deemed it unconstitutional.[164] The Monongahela case cited in Florida Power is over a century old, but is often cited for the principle that determination of just compensation is clearly a judicial, and not a legislative, question:

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[160]See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J. dissenting) (citing United States v. Dickinson, 331 U.S. 745, 748 (1947)).

[161]Thus, for example, the Commission's proposal to establish a "default" price for the sale of home run wiring, absent the right to a *de novo* adjudication of just compensation, would not satisfy the takings clause. Further Notice at ¶ 37; see also Section III.B.3., *supra*.

[162]Florida Power, 772 F.2d at 1546 (determination of just compensation must be determined by adjudication and any rule purporting to set compensation is itself unconstitutional).

[163]Id. at 1546 (citations omitted).

[164]Id.

> when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[165]

Just compensation must be determined through an adjudication because the due process clause assures a private party the right to a full hearing upon deprivation of property.[166] The hearing required by the due process clause must be before a "court or other tribunal empowered to perform the judicial function involved," and must include the right to "introduce evidence and have judicial findings based upon it."[167] Absence of such procedures in any rules adopted by the Commission would render them constitutionally infirm.

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[165]Monongahela, 138 U.S. at 327; see also United States v. Sioux Nation of Indians, 448 U.S. 371, 417 (1980); Washington v. United States, 214 F.2d 33, 44 (9th Cir. 1954).

[166]See, e.g., Baltimore & Ohio R.R., 298 U.S. at 368.

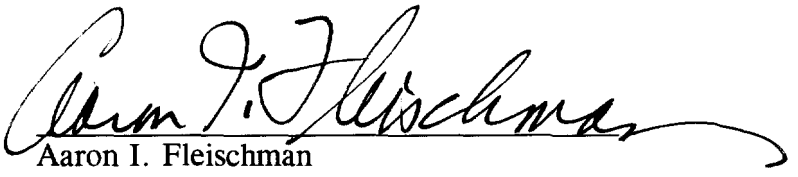
[167]Id. (footnotes omitted).

V. Conclusion.

For all the reasons set forth above, the Commission should not adopt the proposal put forth in the Further Notice as it currently exists. If any procedural rules affecting the disposition of home run wiring in MDUs are adopted, they should be clarified and refined in accordance with the foregoing Comments.

Respectfully submitted,

TIME WARNER CABLE

By: 

Aaron I. Fleischman
Arthur H. Harding
Jill Kleppe McClelland
Craig A. Gilley

FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
202/939-7900

Its Attorneys

Dated: September 25, 1997
57012.8

EXHIBIT A

Barry Rosenblum
President

TIME WARNER
CABLE OF NEW YORK CITY

September 4, 1997

Mr. Michael J. Mahoney
President
C-TEC Corporation
105 Carnegie Center
Princeton, New Jersey 08540

Dear Mr. Mahoney:

At our meeting several months ago you invited me to contact you directly to discuss and resolve any operational problems encountered by TWCNYC in buildings that continue to be served by TWCNYC where RCN has commenced providing its service as well. Unfortunately, a previous effort by me to contact you was not successful. However, I think we both share the sentiment that contacts between us directly, rather than through counsel would best facilitate resolution of ongoing problems and therefore I write in an attempt to raise such matters.

In recent months, but especially the last few weeks, we have had problems in a number of buildings where RCN technicians have switched TWCNYC customers to RCN's service without any request by such customers and contrary to their wishes. Most recently, we have experienced these problems at 421 Hudson Street.

We know of three TWCNYC customers at 421 Hudson who were involuntarily switched to RCN: (1) Loren Laney (Apt. 225), who complained to TWCNYC that he was switched to RCN on August 25th and (after having his service restored by TWCNYC) again on August 28th: (2) Tetsuji Kunishi (Apt. 714), who complained that he was switched to RCN on August 22nd; and (3) David Shadrack (Apt. 313) (who has since moved from the building), who complained that he was disconnected from his TWCNYC service by RCN on August 25th. Mr. Laney has advised TWCNYC that if he is disconnected again, he will not resume TWCNYC service (even though he does not blame TWCNYC

for his disconnections) because it is simply too inconvenient to have this problem recur time and again.

We have had similar occurrences, involving involuntary switching of customers and the unauthorized use of TWCNYC facilities at a number of other buildings. By way of further example, I have attached letters from our customer Yukimi Konno, who resides at 380 Rector Place, Apt. 5A, reflecting her frustration at having been involuntarily disconnected from TWCNYC service on at least seven occasions. Although the involuntary switching of customers has been a serious problem, the misappropriation of TWCNYC's facilities is also of significant concern. TWCNYC will not allow the unauthorized use of its facilities by RCN.

In light of these issues, it is important that we meet to discuss methods of resolving and preventing recurrence of such problems in buildings where TWCNYC and RCN (now or in the future) both provide service. It is our preference to reach agreement on procedures that can be used by both of our companies to minimize inconvenience and prevent service disruption to our respective customers.

Please call me as soon as possible so that we can arrange a meeting.

Very truly yours,

Barry Rosenblum

BR:sw